IN THE

Supreme Court of the United States

October Term 1946

No. 346

SILESIAN AMERICAN CORPORATION, Debtor
and SILESIAN HOLDING COMPANY,

Petitioners,

against

JAMES E. MARKHAM, Alien Property Custodian,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

GEORGE W. WHITESIDE,
Counsel for Silesian American Corporation, Debtor and Silesian Holding Company, Appellants.

LEONARD P. MOORE,
WILLIAM GILLIGAN,
Of Counsel.

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TO THE HONORABLE FRED. M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners Silesian American Corporation and Silesian Holding Company respectfully show to this Court:

Statement of the Matter Involved

The Silesian American Corporation is a Debtor in a proceedings for reorganization of a corporation under Chapter X of the Bankruptcy Act, and the Silesian Holding Company is the owner of more than half of all the outstanding shares of the Silesian American Corporation.

The Debtor is a Delaware Corporation whose corporate structure is set forth in the petition filed with the District Court (R. 5). For many years 50,000 shares of Debtor's 7% cumulative non-voting preferred stock (41.67%) with a par value of $5,000,000, and 98,000 shares of its common stock (49%) without par value but with a stated value of $490,000, were registered in the name of a Swiss corporation briefly referred to as "Non-Ferrum" (R. 6). This latter corporation was included in the list of blocked nationals revised February 7, 1942 (R. 6).

Debtor's income being derived from sources in Europe, was interrupted by the war and Debtor was consequently unable to meet obligations on a bond issue which matured August 1, 1941 (R. 40 and 41). Petition herein was therefore filed and trustees appointed July 30, 1941 (R. 34-39). In his report under §167 (5) Bankruptcy Act, the trustee found that the Debtor's shares registered in the name of Non-Ferrum had been pledged as security for loans made by certain Swiss banks for several million dollars (R. 41). In 1941 these Swiss banks were willing to lend to the Debtor substantial funds to meet its maturing obligations but the Treasury Department would not license this transaction (R. 41), despite the facts that in the several proceedings before the Treasury the interests of the Swiss banks were clearly established and the banks were not included in the so-called "black list" nor was there any suggestion that they were inimical to the United States (R. 7).

In November 1942, the Alien Property Custodian disregarding the non-enemy interest of the Swiss banks, and disregarding also the fact that the shares were frozen under Executive Order 8389, issued a vesting order upon

a finding that the shares registered in the name of Non-Ferrum were property of "a national of a designated enemy country (Germany)" and "determining that to the extent that any or all such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of the aforesaid enemy country * * *" (R. 14). The order did not mention or express any intention to vest the interests of the Swiss banks.

In February 1943 the Custodian demanded that the Debtor cancel on its books the certificates issued to Non-Ferrum and issue new certificates in the name of the Custodian (R. 16). The outstanding certificates were held by the Swiss bank and their attorney thereupon notified the Debtor that if such new certificates were issued, the Debtor would act at its peril (R. 27). The order appointing trustees contains no provision authorizing the issuance by the Debtor of any certificates (R. 34 to 39).

§8(a) of the Trading With the Enemy Act of 1917 provides that a pledgee of property with power of sale who is not an enemy or ally of enemy may retain possession of the property, and the history of this section in Congress showed that it was not intended that the Alien Property Custodian could summarily take possession of enemy property in the hands of a friendly pledgee. The amendment to §5(b) contained in the First War Powers Act, 1941, authorized the vesting of property of a foreign government or national thereof, but it seemed that in order to sustain the constitutionality of the amendment, it was necessary to construe these words as meaning "enemy or ally of enemy foreign country or national thereof". In addition there were numerous other questions as to the meaning of the

applicable statute and the effectiveness of the procedure resorted to by the Alien Property Custodian thereunder.

The Debtor therefore obtained an order directing that cause be shown why the District Court should not instruct the Debtor under the circumstances (R. 3). A motion, originally returnable May 12, 1943 (R. 3), was adjourned from time to time until June 26, 1945, when it was argued at length, and thereafter an order was made under date of October 30, 1945, directing the Debtor to cancel on its books and records all evidence showing that the described shares are owned by Non-Ferrum, and requiring the Debtor to issue and deliver to the Alien Property Custodian new certificates representing the said shares (R. 50).

An appeal to the Circuit Court of Appeals for the Second Circuit was promptly taken by the Debtor (R. 52) and also by its majority stockholder the Silesian Holding Company (R. 60). The notice of appeal was served upon all parties entitled to notice in the reorganization proceedings. Only the Alien Property Custodian filed a brief and appeared in opposition at the hearing. The appeal was argued on June 5th and the Circuit Court of Appeals affirmed the order of the District Court on July 3rd, 1946, with an opinion by Judge Learned Hand (R. 63 *seq.*).

Jurisdictional Statement

The basis upon which it is contended that this Court has jurisdiction to review the order of affirmance are the provisions of Sec. 121 of Chap. X of the Bankruptcy Act (52 Stat. 885; 11 U. S. C. §521); the provisions of §47 of the Bankruptcy Act (11 U. S. C. §47), and §240(a) of the Judicial Code (28 U. S. C. §347).

The Questions Presented

1. Whether §8(a) of the 1917 Act is one of the "permanent" sections of the statute?

The appellants argued that in *Markham* v. *Cabell* (1945) 326 U. S. 404, this Court held that certain sections of the 1917 statute were to be treated as "permanent" in their nature and that §8(a) was one of the sections so to be regarded. In its opinion the Circuit Court said (R. 67), "It is true that in the original Act §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; * * *" but the Court concluded that this had been changed by reason of the 1941 amendment to §5(b).

2. Whether the provisions of §8(a) of the 1917 Act to the effect that a pledgee who is not an enemy or ally of enemy may continue to hold enemy property pursuant to the agreement of pledge, are still applicable?

The appellants argued that whereas §8(a) provides that any person not an enemy or ally of enemy holding property under an agreement of pledge subject to a power of sale, "may continue to hold said property", the Swiss banks as friendly aliens and pledgees were entitled to continue to hold the shares against the demand for possession by the Alien Property Custodian. The Circuit Court said (R. 67), "* * * for argument we will assume that it [§8(a)] forbad disturbing the possession of a pledgee who was not himself an enemy or ally of enemy. But after the amendment of §5(b) had extended the power to seize all interests of friendly aliens, §8(a) could no longer protect their pledges once the Custodian found that the interest of the United States demanded their seizure, anymore than it protected the pledges of enemies or allies of enemies.

Any other interpretation of the section would make the pledges of friendly aliens a wholly irrational exception to the general purpose to subject all alien interests to seizure." The Circuit Court of Appeals thus in effect eliminated from §8(a), and also from §9(a) the phrase "any person who is not an enemy or ally of enemy" and substituted in place thereof the phrase, "any person who is a citizen".

3. Whether §5(b) as amended is unconstitutional because it lacks provision for due process?

The appellants argued that §5(b) is unconstitutional so far as it affects the property of friendly aliens because it fails to meet the requirement of due process. The Circuit Court in its opinion made no reference to this argument.

4. Whether §5(b) as amended is unconstitutional because it purports to authorize the taking of the property of friendly aliens without provision for just compensation?

The appellants argued that §5(b) is unconstitutional because it purports to authorize the taking of property of friendly aliens without provision for just compensation and that the Custodian's claim that just compensation can be obtained under the Tucker Act is not sound for the reason that the Tucker Act withholds from the Court of Claims jurisdiction regarding rights that have become the subject of an international treaty, as is the case with the rights of Swiss citizens, and for the further reason that §7(c) of the Trading With the Enemy Act expressly provides that the sole relief of any person whose property has been seized by the Custodian shall be that provided by the terms of the Trading With the Enemy Act. The Circuit Court in its opinion conceded that (R. 67) "• • • it can be argued with much force that, unless some provision can

be found by which he (a friendly alien) may secure compensation, §5(b) is unconstitutional; * * *. However that may be, it is settled by many decisions * * * that when the United States seizes the property of an individual not an enemy in pursuance of a public purpose, it impliedly promises to pay just compensation, and that that promise is 'just compensation' under the Fifth Amendment." The Circuit Court made no reference to the appellants argument that aliens whose rights are protected by treaty may not sue in the Court of Claims, which is the only Court where an implied promise may be enforced, nor to the appellants argument that the sole remedy of a person whose property has been seized by the Custodian is that provided for in the Trading With the Enemy Act.

5. Whether §5(b) as amended is unconstitutional because it represents an unlawful delegation of legislative power?

The appellants argued that §5(b) is unconstitutional because it represents an unlawful delegation of legislative power. In its opinion the Circuit Court states (R. 65), "* * * it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standards except that he shall act through 'rules and regulations'. The only objection to this which can be raised is that it disturbed that constitutional 'separation of powers'; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed of statement in any other terms than that the interest of the country demands the pre-

scribed action. That is, however, enough. *New York Central Securities Corporation* v. *U. S.*, 287 U. S. 12. The separation of the executive from the legislative power is in the end a matter of degree anyway; thousands of decisions are made every day by administrative officers which involve a balancing of conflicting interests—the characteristic field for legislation. That the power to seize property (call it executive or legislative as one will) may be lawfully conferred without attempting to fix the conditions is proved by several other statutes of long-standing and of universal acceptance: as for example, the power to condemn of the Federal Works Administrator (§341 of Title 40), that of any executive department in the District (§361 of Title 40), and that of the Secretary of War (§171 of Title 50). Indeed, the power conferred upon the President in §7(c) of the Trading With the Enemy Act itself is without condition; and, so far as concerns unconstitutional delegation, it makes no difference that it is limited to enemy property. * * *"

6. Whether the constitutionality of §5(b) can be preserved only by construing the words "foreign country or national thereof" as meaning "enemy or ally of enemy foreign country or national thereof"?

The appellants argued that the only manner in which the constitutionality of §5(b) could be preserved was to construe the words "foreign country or national thereof" as necessarily meaning "enemy or ally of enemy foreign country or national thereof" because of the fact that §5(b) as amended had been made part of an existing statute designed by Congress as an exercise of its power to confiscate enemy property, in which the criterion phrase was "enemy or ally of enemy". The Circuit Court made no reference to this argument.

7. Whether the exculpatory clauses of §5(b) and §7(e) afford no protection to the Debtor by reason of their unconstitutionality?

The appellants argued that §§5(b) and 7(e) do not protect the Debtor or relieve it from doubt as to liability, (i) because in effect they attempt to enact a conclusive presumption which Congress does not have the power to do; (ii) because they represent an unlawful invasion of the judicial process; and (iii) because §5(b) could not be used to preserve by indirection the constitutionality of a statute otherwise unconstitutional. The Circuit Court based its decision entirely upon the efficacy of §5(b) and therefore made no reference to the argument concerning §7(e). As to §5(b) it made no reference to the argument that the exculpatory clause is unconstitutional as representing a conclusive presumption or an invasion of the judicial process, and concedes that if §5(b) were otherwise unconstitutional it would be doubtful whether the exculpatory clause would be valid. Having held that §5(b) as amended is constitutional, the Court does not expressly state that the exculpatory clause in §5(b) (2) is constitutional, but refers to the clause in a manner which suggests that it is so to be given effect.

8. Whether Executive Order 9193 of July 6, 1942, represents an unlawful delegation of Presidential power?

The appellants argued that even if §5(b) were constitutional, Executive Order 9193 of July 6, 1942 (which supplanted Executive Order 9095 by amendment), under which the Custodian acted, represented an unlawful delegation of Presidential power because by its terms no one could determine whether a friendly alien residing in a nonenemy country was to be treated as "a national of a des-

ignated enemy country" until the Custodian had determined in a particular case that the national interest of the United States required such person to be treated as a national of a designated enemy country. The Circuit Court appears to have misconceived the nature of this argument. In its opinion the Court said (R. 66): "* * * Nor does it matter that by Executive Order No. 9095 the President in turn delegated his powers to the Custodian, authorizing him to 'vest' in himself the property of a friendly alien when he determined that this was 'necessary in the national interest'. That was in effect the same condition on which the President's own power was conferred; and in the nature of things the President cannot personally exercise the least fraction of the manifold powers of every description which are granted to him—more truly which are imposed upon him. If he may not depute their exercise, they are sterile as stones. Whether Executive Order No. 9095 was definite enough to be valid is separate from whether the power was improperly delegated by Congress. That objection is valid only in case the holder of the seized property may be subjected to duties which he cannot ascertain, which is clearly not true, for all seizures are made by orders *ad hoc*, and the duties imposed are clear and explicit."

9. Whether the vesting order in the case at bar effectively vested the interest of any friendly aliens?

The appellants argued that unlike the earlier vesting orders issued by the Custodian prior to July 6, 1942, which expressly vested specified property upon a finding that it belonged to a national of a foreign country, the vesting order in the case at bar did not on its face purport, and did not in fact by its terms vest the interest

of any friendly alien in the described shares. The Circuit Court disposed of this argument by parenthetically saying (R. 67), "(The Debtor appears to argue that the Custodian's 'vesting' order did not intend to cover the interest of the Swiss banks as pledgees, but that is so plainly untrue, that it need not detain us.)"

10. Whether the vesting order gave effect to a statute designed to authorize the expropriation of the property of friendly aliens instead of a statute designed to confiscate enemy property?

The appellants argued that the vesting order was designed as an exercise of the power to confiscate enemy property, and if §5(b) was actually an exercise by Congress of its power of eminent domain, the vesting order was not framed so as to affect the interests of the Swiss banks. The Circuit Court of Appeals made no reference to this argument.

11. Whether the vesting order derives any vitality from provisions of the Trading With the Enemy Act other than §5(b)?

The appellants argued that the vesting order derived such vitality as it possessed solely from §5(b) as amended, and inasmuch as §5(b) was either unconstitutional or if constitutional did not by reason of §8(a) authorize the Custodian to take possession of the pledged shares, the District Court could not lawfully require the Debtor to issue new certificates. The Circuit Court held §5(b) as amended constitutional and as set forth in subparagraph 2 *supra*, construed §8(a) as having been modified so as to apply only to American citizens instead of "any person not an enemy or ally of enemy".

12. Whether §7(c) precludes any relief or remedy except that provided by the Act.

§7(c) (Appendix p. 46) provides that the sole relief and remedy of any person having any claim to any money or other property seized by the Custodian shall be that provided by the terms of "this Act". The appellants argued that this provision precluded the Swiss banks from seeking compensation under any other statute. The Circuit Court, in its opinion, made no reference to this argument.

13. Whether a subject of Switzerland whose property is taken and is given no means of recovering just compensation, may sue in the Court of Claims in view of the provisions of §259 Tit. 28 U. S. C.?

The appellants argued before the Circuit Court that §259 Tit. 28 U. S. C. which provides that the United States Court of Claims shall not have jurisdiction of claims dependent upon a treaty, precludes any proceeding by the Swiss banks in the Court of Claims, because their rights rest primarily upon the Treaty of Friendship of 1850. The Circuit Court, in its opinion, made no reference to this argument.

14. Whether §5(b) as amended represents an exercise of the War Power of Congress or of the power to provide for the common defense and promote the general welfare?

This point was not argued before the Circuit Court by either party. The Circuit Court said (R. 65):

> "The power of Congress to seize and confiscate enemy property rests upon Art. 1, §8 Clause 11 of the Constitution. *Stoehr* v. *Wallace*, 255 U. S. 239, 242; *United States* v. *Chemical Foundation Inc.*, 272 U. S. 1, 11. Whether it exists at international law may be doubted; but nobody contends that the war

power of Congress includes the seizure of the property of friendly aliens. The amendment of section 5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'. It can rest upon Art. 1, §8, Clause 1; i. e. upon the power 'to provide for the common Defense and general Welfare'; indeed, so far as we can see, the Debtor does not challenge the power itself, but its exercise."

15. Whether by the provision of §5(b) as amended the President in time of emergency declared by him may vest the property of foreign countries or nationals thereof?

This question was not argued by either party before the Circuit Court of Appeals. The Circuit Court however in its opinion states (R. 65) "the amendment of §5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'."

Reasons for the Allowance of the Writ

1. The Court below has decided several important questions of Federal law which have not been, but should be, settled by this Court.

2. The Court below has decided several Federal questions in a way probably in conflict with applicable decisions of this Court.

These reasons are discussed in petitioners' brief (pp. 21 to 42 *infra*).

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled in its Docket No. 20121 (No. 225—October Term 1945), *Silesian American Corporation Debtor, and Silesian Holding Company, Appellants* v. *James E. Markham, Alien Property Custodian Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the order herein of the said Circuit Court of Appeals be reversed by this Court and for such further or different relief as to this Court may seem proper.

Dated, New York, New York, August 1, 1946.

GEORGE W. WHITESIDE,
Counsel for Silesian American Corporation, Debtor and Silesian Holding Company, Appellants.

LEONARD P. MOORE,
WILLIAM GILLIGAN,
Of Counsel.

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No.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion in the Circuit Court of Appeals for the Second Circuit has not yet been reported but appears in the certified copy of the Transcript of Record (R. 63 *seq.*). The opinion of the District Court also appears in the transcript (R. 49).

Jurisdiction

Reference is made to the jurisdictional statement in the petition (p. 4).

Statement of the Case

Reference is made to the "statement of the matter involved" in the petition (pp. 1-4).

Specification of Errors

1. The Circuit Court erred in failing to hold that under the provisions of §8(a) a friendly alien holding enemy property as pledgee with a power of sale may retain possession of such property as against the demand of the Alien Property Custodian.

2. The Circuit Court erred in holding that after the amendment of §5(b) by the First War Powers Act 1941, §8(a) could no longer protect the possession of friendly alien pledgees.

3. The Circuit Court erred in failing to hold that the vesting provision contained in §5(b) as amended is unconstitutional as to friendly aliens for lack of due process unless the words "foreign country or national thereof" are construed as "enemy or ally of enemy foreign country or national thereof".

4. The Circuit Court erred in failing to hold the vesting provision contained in §5(b) as amended unconstitutional as to friendly aliens, as representing an unlawful delegation of legislative power unless the words "foreign country or national thereof" are construed to mean "enemy or ally of enemy foreign country or national thereof."

5. The Circuit Court erred in failing to hold the vesting provision contained in §5(b) as amended unconstitutional as to friendly aliens in authorizing the taking of property without provision for just compensation unless the words "foreign country or national thereof" are construed to mean "enemy foreign country or national thereof."

6. The Circuit Court erred in holding that a friendly alien stands in a position different from either an enemy or ally of enemy or a citizen whose property has been seized.

7. The Circuit Court erred in failing to hold that a friendly alien may not be deprived of his property without due process of law.

8. The Circuit Court erred in holding that a friendly alien whose property has been seized by the Alien Property Custodian is justly compensated by an implied promise to pay just compensation.

9. The Circuit Court erred in failing to hold that the provisions of §250 Tit. 28 U. S. C. whereby suit may be brought against the United States in the United States Court of Claims for property taken, are not available to the Swiss banks because their rights rest primarily on a treaty of friendship between Switzerland and the United States and §259 Tit. 28 U. S. C. deprives the United States Court of Claims of jurisdiction when the claim is dependent on a treaty.

10. The Circuit Court erred in failing to hold that §7(c) of the Trading With the Enemy Act precludes any relief or remedy to a person whose property has been seized except that provided by the said Act.

11. The Circuit Court erred in failing to hold that the power exercised by Congress in authorizing the President to vest the property of any foreign country or national thereof was the same power that had been exercised in enacting the Trading With the Enemy Act of 1917.

12. The Circuit Court erred in holding that the power exercised by Congress in amending §5(b) of the Trading

With the Enemy Act was the power to provide for the common defense and promote the general welfare.

13. The Circuit Court erred in holding that a statute which is claimed to represent the Congressional power to provide for the common defense and promote the general welfare is to be construed with the same constitutional criteria as are applied to a war-time statute requiring the individual to sacrifice life and limb.

14. The Circuit Court erred in failing to hold that the exculpatory clauses of §5(b) and §7(e) are unconstitutional as representing attempts to establish by statute conclusive presumptions.

15. The Circuit Court erred in failing to hold that §5(b) and §7(e) are unconstitutional as representing attempts to invade the judicial process.

16. The Circuit Court erred in holding that under §9(a) a friendly alien would have the formal capacity to sue because he is not an enemy or ally of enemy, whereas the Court holds that under §8(a) he would not have the formal capacity to retain possession of pledged property.

17. The Circuit Court erred in failing to hold that even though §5(b) is constitutional, executive order No. 9193 of July 6, 1942, is an unconstitutional exercise of the powers granted by §5(b) so far as it affects the case at bar.

18. The Circuit Court erred in assuming that the vesting order of the Alien Property Custodian was a valid and effective order so far as the interests of the Swiss banks are concerned.

19. The Circuit Court erred in holding that so far as §5(b) as amended authorizes the President to vest the property of friendly aliens in time of emergency declared by the President it is a constitutionally valid statute.

20. The Circuit Court erred in affirming the order of the District Court.

Summary of Argument

I. The present status of the Trading With the Enemy Act is so confused that it presents an important question of Federal law, which has not been, but should be, settled by this Court.

II. The opinion of the Circuit Court does not conform with the principles set down by this Court in *Markham* v. *Cabell* (1945), 326 U. S. 404.

III. The theory adopted by the Circuit Court regarding the delegation by Congress of Legislative Power, appears to be in conflict with applicable decisions of this Court and was applied in deciding an important question of Federal law which has not been, but should be, settled by this Court.

IV. The effect of the decision of the Circuit Court is to sustain a power of uncontrolled expropriation of foreign owned property, and even the property of citizens, whenever the President deems an emergency to exist, and this is a Federal question which has not been, but should be, settled by this Court.

V. The effect of the decision of the Circuit Court is to violate treaties of friendship with foreign countries, and inasmuch as this Court will not impute to Congress an

intention to produce such a result, the Circuit Court decided an important question of Federal law which has not been, but should be, settled by this Court, and the decision appears to be in conflict with applicable decisions of this Court.

VI. As construed by the Circuit Court §5(b) utterly lacks any provision for due process. It therefore appears to be in conflict with applicable decisions of this Court, and presents an important question of Federal law which has not been, but should be, settled by this Court.

VII. By holding that the amendment of §5(b) does not represent an exercise of the war powers of Congress, but rather of the power to provide for the common defense and general welfare, the Circuit Court decided an important question of Federal law which has not been, but should be, settled by this Court.

VIII. The decision of the Circuit Court that a friendly alien whose property has been taken and whose rights are protected by a treaty of friendship and commerce, may recover compensation in the Court of Claims presents an important Federal question which has not been, but should be, settled by this Court.

POINT I

The present status of the Trading With the Enemy Act is so confused that it presents an important question of Federal law, which has not been but should be settled by this Court.[1]

The Trading With the Ehemy Act of 1917 enacted in connection with World War I was a very important Federal statute that frequently came before this Court for construction. If that statute had not been amended by Congress in connection with World War II many questions which now arise could have been settled by the prior decisions. The First War Powers Act, 1941, however undertook to enact new legislation for handling enemy property. In the Congressional debate Title III of this statute was described as a reenactment of the Trading With the Enemy Act of 1917, the continued vitality of which was a subject of doubt. The form which the new legislation took was an amendment to §5(b) of the previously existing statute. The amendment was very broad in its terms, was described by the House Judiciary Committee as permitting "the establishment of a complete system of alien property treatment" and it was made applicable not only in time of war but also during emergencies declared by the President. If read without relation to the other sections of the old statute of which it became a part, §5(b) purported to deal not with enemy property, but with property of any foreign country or national thereof. Moreover, if the provisions dealing with

[1] §§5(b), 7(c), 7(e), 8(a) and 9(a) of the Act are set forth in the Appendix hereto, pages 43 *seq.*

foreign property were literally construed without reference to the other sections of the 1917 Act, serious questions of constitutionality were raised and the statute could not represent an exercise by Congress of its power during time of war to make rules for captures on land and water, for which reason it would not be entitled to the more liberal construction accorded wartime grants of legislative power.

In the early efforts to administer the statute the President and also the Alien Property Custodian proceeded upon the obvious theory that although enacted as an amendment to a single section of the 1917 Act, it nevertheless constituted a separate and independent grant of power having to do with all alien property. Hence the vesting orders issued prior to July 6, 1942, contained a finding that specified property belonged to a foreign country or national thereof and was therefore vested without any point being made as to whether it was enemy owned.[2]

It is probable that the exercise of these broad powers alarmed friendly foreign nations and on July 6, 1942, by Executive Order 9193 a new scheme was devised for administering the statute in a manner that seemed to simulate the practices that had been followed in World War I. Although §5(b) as amended, itself contained no reference to the word "enemy" there was introduced by this Executive Order the term "designated enemy country" and

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[2] See the list of early vesting orders and the Federal Register citations at pages 99 and 100, *Annual Report, Office of Alien Property Custodian to June 30, 1944.* Vesting Order 48, dated July 8, 1942, 7 F. R. 5737 is the first order which finds that the described property "is property of a national and represents a business ownership of a business enterprise within the United States which is a national of a designated enemy country (Japan)".

"national of a designated enemy country". These definitions were so comprehensive that it was possible for a wholly guileless citizen of the United States to be treated as a national of a designated enemy country if the Alien Property Custodian in a particular case determined that the interests of the United States so required, and as a matter of policy and practice, vestings were thereafter generally limited to property found to belong to a national of a designated enemy country.

The result has been to produce a condition of chaos in all serious attempts to interpret the statute.

In the case at bar many aspects of the statute come under consideration because the basic question involved is whether by any interpretation of the statute, an American corporation in the custody of a District Court may be required to issue new certificates for shares standing on its books in the name of a Swiss corporation which the Custodian has found to be a national of a designated enemy country, when the trustee appointed by the Court reported before the outbreak of war that such shares had been pledged with friendly aliens to secure a substantial loan, and hence, the certificates representing the shares were not surrendered by the Custodian.

Not only the constitutionality of the statute, but also its meaning are subject to serious doubt, as appears from the opinion of the Court below. The opinion of this Court in *Markham* v. *Cabell*, 326 U. S. 404, established the doctrine that the "permanent" provisions of the 1917 statute have not lost their vitality, and that §9(a) is still to be given effect so far as American citizens are concerned, but this Court has not yet been called upon to decide how §5(b) as amended should be construed so as to preserve its constitutionality with respect to friendly aliens, and what

effect that section has had upon the provisions of §§8(a) and also 9(a) which have heretofore protected the rights of friendly aliens.

A decision by this Court is therefore necessary to settle the law.

POINT II

The opinion of the Circuit Court does not conform with the principles set down by this Court in *Markham* v. *Cabell*, 326 U. S. 404.

In its opinion the Circuit Court conceded that §8(a) prior to the amendment of §5(b) in 1941, "protected a pledgee who was a friendly alien just as it protected a citizen pledgee" (R. 67). As much is also said concerning §9(a) (R. 66). After the enactment of §5(b) however, the Circuit Court states, "§8(a) could no longer protect" the pledges of friendly aliens, "anymore than it protected the pledges of enemies or allies of enemies" (R. 67). A similar conclusion is implied with respect to §9(a) (R. 66).

Thus the Circuit Court has entirely changed the meaning of §8(a) and §9(a). Whereas these sections originally applied to persons who were not enemies or allies of enemies, as now construed by the Circuit Court they apply only to persons who are citizens. The Circuit Court does not contemplate the problem that would arise if a citizen were determined to be a national of a foreign country by the extraordinary definitions of "national" that have been established through executive order in the administration of the statute.[3]

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[3] The definitions of "national" currently employed in Executive Orders 8575 and 9193 are set forth in the Appendix hereto, pages 50 *seq. infra.*

The opinion of this Court in *Markham* v. *Cabell* (1945), 326 U. S. 404, does not indicate that this Court intended any such result. Mr. Justice Douglas said at page 410:

> "The right to sue explicitly granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending section 5(b) desired to delete or wholly nullify section 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as part of an integrated whole. We should give each as full a play as possible."

Mr. Justice Burton, in his opinion (p. 416) states that certain sections of the 1917 Act, including specifically §9, were intended as permanent legislation. What is true of §9 must also be true of §8, from which it follows that §8(a) and §9(a) were permanent portions of the statute with which the provisions of §5(b) should be integrated.

No such integration has taken place in the decision of the Circuit Court. Instead of integrating §5(b) with §§8(a) and 9(a), the Circuit Court has obliterated very substantial portions of the older sections.

Whether such a result represents a true construction to be placed upon §5(b) will not be known until the question has been passed upon by this Court.

POINT III

The theory adopted by the Circuit Court regarding the delegation by Congress of Legislative Power, appears to be in conflict with applicable decisions of this Court and was applied in deciding an important question of Federal law which has not been, but should be, settled by this Court.

By resting the efficacy of §5(b) on the common defense and general welfare clause, and emphasizing the point that the amendment was not limited to time of war but was to go into effect upon any national emergency, the Circuit Court removed the statute from the category of war-time emergency legislation, and thereby denied it the tolerance accorded to other statutes confined by their terms to the period of World War II (Cf. *Yakus* v. *U. S.* (1944), 321 U. S. 414; *Bowles* v. *Willingham* (1944), 321 U. S. 503). Consequently, when so construed, §5(b) must meet the tests imposed without the background of war. These were stated by Mr. Chief Justice Hughes in *Panama Refining Company* v. *Ryan* (1934) 293 U. S. 388-415 as follows:

> "• • • Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

And in holding that §9(c) of the National Industrial Recovery Act was unconstitutional, he said at page 430:

> "• • • As to the transportation of oil production in excess of state permission, the Congress has de-

cleared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

In its opinion, the Circuit Court of Appeals made no pretense of meeting these requirements. It states (R. 65):

"* * * it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standard except that he shall act through 'rules and regulations'. The only objection to this which can be raised is that it disturbs the constitutional 'separation of powers'; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed, of statement in any other terms than that the interest of the country demands the prescribed action. That is, however, enough. *New York Central Securities Corp.* v. *U. S.*, 287 U. S. 12. The separation of the executive from the legislative power is in the end a matter of degree anyway; thousands of decisions are made every day by administrative officers which involve a balance of conflicting interests—the characteristic field for legislation. That the power to seize property (call it executive or legislative as one will) may be lawfully conferred without attempting to fix the conditions, is proved by several other statutes of long standing and of universal acceptance; as for example, the power to condemn of the Federal Works Administrator (§341 of Title 40), that of any executive department in the District (§361 of Title 40), and that of the Secretary of War (§171 of Title 50). Indeed, the power conferred upon the

President in §7(c) of the Trading With the Enemy Act itself is without condition; and, so far as concerns unconstitutional delegation, it makes no difference that it is limited to enemy property. * * *".

The above statement not only gives expression to a new theory for the delegation of legislative power; it also imports into §5(b) provisions which it does not contain and misapprehends the significance of the case and the statutes cited.

§5(b) stipulates that the President "* * * *may* * * * under such rules and regulations as he *may* prescribe * * *" do the various acts specified. The statute contains no requirement that the issuance of rules and regulations shall be a condition precedent to any such acts, and it is therefore grievously incorrect to suggest that Congress has provided a standard to be determined through rules and regulations.

The suggestion that the power contained in §5(b) is to be exercised only when the interest of the country demands, also lacks authenticity. There is no such requirement in the statute. The most that the statute contains is a provision that once property has been vested, it is to be held "in the interest and for the benefit of the United States". This certainly does not constitute a limitation on the power to vest.

The statement that the interest of the country demands the prescribed action is sufficient to sustain a delegation of Congressional power is not supported by the case which the Court cites, viz. *New York Central Securities Corporation* v. *U. S.*, 287 U. S. 12. That case involved the Transportation Act of 1920. The Act expressly stated its purpose, set forth its policy, and authorized the Interstate

Commerce Commission after holding hearings and investigating the matter, to approve certain rearrangements in the transportation system which would "best promote the service in the interest of the public and the commerce of the people". In that statute Congress expressly declared a policy, set up standards to guide the Commission's action, and required findings by the Commission as a condition precedent to the exercise of such authority. None of these safeguards are to be found in §5(b) as amended. As stated by the Circuit Court, it "gives the President unrestricted power to be exercised at his discretion".

The reference by the Circuit Court to the powers of the Federal Works Administrator (§341 Title 40); the executive departments of the District (§361 Title 40) and the Secretary of War (§171 Title 50) are all misleading and do not sustain the point for which they are cited, because so far as acquiring property without the owner's consent is concerned, the powers granted by each statute are powers to condemn property for the use of the Government through the provisions of §§257 *et seq.* of Title 40 requiring a recourse to judicial proceedings. The mere *ipsi dixit* of the particular official has no effect until it is implemented by an order of the court, and its exercise is circumscribed by other requirements. §171 of Title 50, for example, is limited by §174 of the same Title so that the Secretary of War may not "involve the Government in any contract or contracts for the future payment of money, in excess of the sum appropriated therefor".

As to the statement that the power conferred upon the President by §7(c) of the 1917 Act is without condition, this also is incorrect, because that section required an investigation and determination by the President and a showing that the property belonged to an enemy or ally of

enemy not licensed by the President (50 U. S. C. A., p. 210, Appendix p. 46, *infra*).

In *Commercial Trust Company* v. *Miller* (C. C. A. 3d, 1922), 281 F. 804 affd. 262 U. S. 51, Judge Wooley at page 806 implied that any irregularity or insufficiency on the part of the Alien Property Custodian in complying with the requirements of §7(c) would have rendered the seizure invalid, and in the Supreme Court, Mr. Justice McKenna at page 56, indicated that a determination pursuant to the provision of §7(c) was a condition precedent to a lawful seizure. In *Hunter* v. *Central Union Trust Co.* (D. C. S. D. N. Y., 1926) 17 F. 2d 174, it was held that a failure to make a determination in compliance with the requirement of the statute rendered an attempted seizure by the Custodian invalid. The Government seems to have acquiesced in this decision by failing to take an appeal.

The opinion of the Circuit Court of Appeals holds in effect that Congress may grant to the executive power to seize property without limitation, and without even indicating the policy to be pursued in making the seizures. Such a doctrine goes so much further than any decision ever enunciated by this Court that the national interest requires the subject to be reviewed.

POINT IV

The effect of the decision of the Circuit Court is to sustain a power of uncontrolled expropriation of foreign owned property, and even the property of citizens, whenever the President deems an emergency to exist, and this is a Federal question which has not been, but should be, settled by this Court.

In its opinion the Circuit Court of Appeals states (R. 65), "The amendment of §5(b) must therefore rest on some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'." The opinion may therefore be understood as holding that the President may declare an emergency for the determination of which Congress has set no standard, and by reason of such declaration, the President may expropriate or otherwise deal with property belonging to foreign governments or nationals thereof in the same manner as such property was dealt with in time of war. Furthermore, the word "national" may be made to mean anything that the President by executive order wishes. Under the present definition, a "national" may be an American citizen, and thus a way may be found for expropriating the property of even American citizens.[4] No manner of due process is provided in connection with the exercise of this power, and according to the Circuit Court, the only remedy available to a person whose property has been taken is a

[4] The definitions of "national" currently employed in Executive Orders 8575 and 9193 are set forth in the Appendix hereto, pages 50 *seq. infra.*

proceeding in the Court of Claims on an implied promise to pay.

There are many reasons why §5(b) may be unconstitutional so far as it relates to a declared emergency, as compared with a state of war, and the opinion of the Circuit Court of Appeals should not be allowed to stand as a misleading signpost for hasty action by future executives. If the power to vest foreign property represented an exercise of the War Power of Congress, then, at least the emergency contemplated must necessarily be an emergency connected with war. The emergency clause was first introduced in 1933 (48 Stat. 1) in connection with the regulation of foreign exchange and currency. The power to vest foreign property was first introduced immediately after the declaration of war (55 Stat. 839). It is therefore evident that the word "emergency" has a different meaning as to different portions of the statute.

These considerations make highly desirable a review of the subject by this Court.

POINT V

The effect of the decision of the Circuit Court is to violate treaties of friendship with foreign countries, and inasmuch as this Court will not impute to Congress an intention to produce such a result, the Circuit Court decided an important question of Federal law which has not been but should be settled by this Court, and the decision appears to be in conflict with applicable decisions of this Court.

If the phrase "foreign country or national thereof" contained in §5(b) is not construed as amending "enemy or ally of enemy foreign country or national thereof", but

is given the meaning ascribed to it by the Circuit Court, the necessary result is to violate practically all treaties of friendship with foreign nations.

In its opinion the Circuit Court said (R. 66):

> "A friendly alien stands in a position different from either an enemy or a citizen whose property has been seized."

By reason of the distinction thus declared, a pledgee under §8(a) who is a citizen may retain possession of his property, whereas a friendly alien may not do so. The opinion expressly says as much (R. 67). And under §9(a), a citizen whose property has been seized may recover it, but if it be the property of a friendly alien, he is relegated to a suit on an implied promise (R. 66).

Article 1 of the *Convention of Friendship, Commerce and Extradition*, of 1850, between the United States and Switzerland (2 Mallory, *Treaties, Conventions* etc. p. 1763), which is still in effect (*Treaties in Force on December 31, 1941*, Pub. 2103, U. S. State Dept. p. 161), provides that "The citizens of the United States of America and the citizens of Switzerland shall be * * * treated upon a footing of reciprocal equality in the two countries * * *. * * * they * * * shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens * * *. No * * * more burdensome condition shall be imposed upon * * * the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject."

These clauses mean that the property rights of a friendly alien must be respected in the same manner as are those of our citizens (Cf. 1 Hyde *International Law*,

p. 714). Such a result does not follow however when §5(b) is construed to mean that under §8(a) a citizen may retain possession of property held as a pledge whereas a friendly alien must surrender it, or that a citizen may recover in a proceeding under §9(a) property seized by the Custodian, whereas a friendly alien may not recover the property under any circumstances and may only obtain on an implied promise after a protracted litigation its reasonable market value at the time of seizure.

It is inconceivable that in enacting §5(b) Congress intended such a disruption of our international obligations.

In interpreting Congressional enactments an intention to supersede a treaty will not be readily implied. *In re Chin A. On* (1883), 18 F. 506; *Frost* v. *Wenie* (1895), 157 U. S. 46; *Lem Moon Sing* v. *U. S.* (1895), 158 U. S. 538-50; *Cheung Sum Shee* v. *Nagle* (1925), 268 U. S. 336-346; *Pigeon River Imp. Co.* v. *Cox* (1934), 291 U. S. 138-163.

If the decision of the Circuit Court is to stand, one may expect that all nations with whom we have treaties of friendship entered into before 1941 will wish to renegotiate these treaties, so that the new treaties will supersede the provisions of §5(b) and thus be deemed to have nullified the power of seizure therein contained so far as the particular nation is concerned (*Cook* v. *U. S.* (1933), 288 U. S. 102, 118-120).

The effect of the decision of the Circuit Court of Appeals on such an important aspect of our international relations should be sufficient in itself to prompt this Court to review a decision capable of producing the results indicated.

POINT VI

As construed by the Circuit Court §5(b) utterly lacks any provision for due process. It therefore appears to be in conflict with applicable decisions of this Court, but presents an important question of Federal law which has not been but should be settled by this Court.

In *Garvin* v. *$20,000 Bonds* (C. C. A. 2d 1920) 265 F. 477, affd. 254 U. S. 554, the Circuit Court of Appeals for the Second Circuit itself said at page 479:

> "* * * If persons not alien enemies or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9."

The doubtful constitutionality of the statute lacking the remedy provided by §9(a) was also mentioned by Mr. Justice Stone in *Becker* v. *Cummings* (1935) 296 U. S. 74, where he said at page 79:

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it."

and at page 81:

> "* * * its (The Trading With the Enemy Act) dominant purpose, often recognized by this Court (is) to give to citizens and *alien friends* an adequate remedy for invasions of their property rights in the

> exercise of the war powers of the Government. Any other constructions by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies."

If the Circuit Court of Appeals for the Second Circuit in 1920 believed that a statute lacking the remedy of §9(a) would be unconstitutional, and this Court in 1935 entertained serious doubt as to whether it would be constitutional, it would seem incumbent upon this Court as a simple matter of clarifying the record to review the subject and determine whether §5(b) when construed as lacking the remedy of §9(a) so far as friendly aliens are concerned is now constitutional in spite of the previous *dicta* to the contrary.

POINT VII

By holding that the amendment of §5(b) does not represent an exercise of the War Powers of Congress, but rather the power to provide for the common defense and general welfare, the Circuit Court decided an important question of Federal law which has not been but should be settled by this Court.

In *Stoehr* v. *Wallace* (1921), 255 U. S. 239, this Court said at page 241:

> "The Trading With the Enemy Act, whether taken as originally enacted * * * or as since amended * * * is *strictly a war measure* and finds its sanction in the constitutional provision, Art. I §8, cl. 11, empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' "

The amendment of §5(b) now before the Court was contained in Title III of the First War Powers Act, 1941. The fact that the provisions introduced into §5(b) were thus incorporated in the First War Powers Act, and the further fact that they were introduced as an amendment to a section of the statute which this Court had declared to represent an exercise of war powers, strongly suggests that Congress intended the amendment to constitute an exercise of its war powers. If such were the case, the power contained in §5(b) to vest the property of a foreign country or a national thereof must have referred to an enemy foreign country.

The Circuit Court held that the vesting power related to a foreign country whether friend or enemy, and to a national thereof. It was therefore necessary for the Circuit Court to find some other constitutional authority to sustain the Court's construction of the statute. This was done by asserting that the power was derived from the power of Congress to provide for the common defense and general welfare. The Court said in its opinion (R. 64):

> "• • • However, the amendment of 1941 • • • gave power to the President • • • to 'compel • • • any • • • transfer' of such property; and as the section expressly covered all property 'subject to the jurisdiction of the United States' it included shares of stock in a domestic corporation. *Stoehr* v. *Wallace*, 255 U. S. 239; *Great Northern Railway Co.* v. *Sutherland*, 273 U. S. 182. The power of Congress to seize and confiscate enemy property rests upon Art. 1 §8 Clause 11 of the Constitution. *Stoehr* v. *Wallace*, *supra* p. 242; *United States* v. *Chemical Foundation Inc.*, 272 U. S. 1-11. • • • The amendment of §5(b) must therefore rest upon some other power of Congress, not only for that reason, but

because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'. It can rest upon Art. 1, §8, Clause 1; *i. e.*, upon the power 'to provide for the common Defense and general Welfare' . . . ."

The Custodian made no argument before the Circuit Court that §5(b) was intended to implement the power of Congress to provide for the common defense and the general welfare. In the literature on the subject there has been a suggestion that the statute contemplated condemnation (McNulty, *Constitutionality of Alien Property Controls*, XI Law and Contem. Prob. 135-141), but the Circuit Court did not rest the power on eminent domain, probably because §5(b) failed to follow the usual pattern of an eminent domain statute, as argued by Mr. John Foster Dulles (*The Vesting Power of the Alien Property Custodian* (1934) 28 Corn. L. Q. 245-250), and also because some doubt possibly existed as to whether the taking was for a public use in the sense required by eminent domain. In *U. S. v. 243.22 Acres of Land* (1942) 43 F. Sup. 561, affd. 129 F. 2d 676, the same Court affirmed an opinion which stated that the Government may not acquire property where it may be of no benefit to the Government. In the vesting of foreign property it is the act of vesting, which operates to deprive the enemy of the use of the property, that is conceived to be beneficial to the United States. The property itself, frequently becomes a burden rather than a benefit and the carrying charges are imposed upon the property itself instead of being borne by the United States as would be the case if the property were actually a benefit to the Government. Thus, §5(b) as amended does not require that property to be vested shall be for the use of the

United States but merely provides that after vesting has actually occurred, it shall be *held* for the benefit of the United States.

By grounding the statute on any power other than the making of rules concerning captures on land and water the Circuit Court superimposed an entirely different design which cannot be fitted to the permanent sections of the 1917 Act without producing more questions than are solved. To avoid this difficulty is undoubtedly the reason why the Custodian in both the District Court and the Circuit Court argued that §5(b) represented a grant of power separate and independent from but collateral with the permanent sections of the 1917 Act.

The nature of the power that Congress intended to exercise is an important factor in determining how the statute should be construed. This consideration in itself should be sufficient to induce this Court to review the matter and indicate the theory on which §5(b) as amended is to be construed.

POINT VIII

The decision of the Circuit Court that a friendly alien whose property has been taken and whose rights are protected by a treaty of friendship and commerce, may recover compensation in the Court of Claims presents an important Federal question which has not been but should be settled by this Court.

In its opinion the Circuit Court said (R. 67), "* * * it is settled by many decisions * * * that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly promises to

pay just compensation, and that that promise is 'just compensation' under the Fifth amendment."

A promise to pay just compensation is in a large measure worthless if the promisee may not establish the amount thereof and recover judgment in a proper legal proceeding.

Actions on implied promises of the United States may only be brought in the Court of Claims, under the provisions of the so-called Tucker Act. In the very case cited by the Circuit Court (*Yearsley* v. *Ross* (1940), 309 U. S. 18), this Court said that inasmuch as the property had been taken by the direction of Congress, suit should have been in the Court of Claims under the Tucker Act (§250, Tit. 28 U. S. C.).

The Tucker Act, however, does not authorize suits in the Court of Claims by aliens whose rights are the subject of international treaty. §259, Tit. 28 U. S. C. reads as follows:

> "The jurisdiction of the said Court (of Claims) cannot extend to any claim against the Government • • • growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

As pointed out elsewhere herein (*supra*, p. 33), the Treaty of Friendship and Commerce between the United States and Switzerland protects the rights of Swiss subjects and requires that "• • • they shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, • • •. No pecuniary or other more burdensome condition shall be imposed • • • upon the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside,

nor any condition whatever to which the latter shall not be subject."

Any proceeding by the Swiss banks to recover just compensation for the expropriation of their rights in the shares described by the vesting order would rest primarily on the Treaty of Friendship and Commerce of 1850. This treaty antedated §259 Tit. 28 U. S. C. which was originally enacted in 1863 (12 Stat. 767; see Historical Note to §259 Tit. 28, U. S. C. A.), and hence, it cannot be said that the treaty has modified the statute. Consequently, the rights of the Swiss banks are dependent upon a treaty, and for that reason the United States Court of Claims does not have jurisdiction to entertain such a proceeding.

Moreover, §7(c) (Appendix, p. 47 *infra*) provides that the sole relief and remedy of a person whose property has been seized shall be that provided by the Trading With the Enemy Act, and in *Becker Co.* v. *Cummings* (1935) 296 U. S. 74, it was said in the dissenting opinion of Mr. Justice Roberts, concurred in by Mr. Justice Sutherland, in discussing a point as to which the prevailing opinion was not in conflict, at page 84:

> "* * * the express provisions of §7 of the Trading With the Enemy Act, that the sole relief and remedy of any person having a claim under the Act shall be that afforded by the Act, precludes a suit for the property or the proceeds of it under the Tucker Act."

The result is that the Swiss banks do not even have a right to obtain just compensation for the property which will be taken if the decision of the Circuit Court is given effect.

This presents another important question of Federal law which has not been but should be settled by this Court.

Conclusion

For the reasons stated in the petition and in this brief, the application for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE W. WHITESIDE,
Counsel for Petitioners,
Silesian American Corporation, Debtor, and Silesian Holding Company.

LEONARD P. MOORE,
WILLIAM GILLIGAN,
Of Counsel.

APPENDIX

THE TRADING WITH THE ENEMY ACT

SUBDIVISION 5(b)

as amended by

§301, Title III, First War Powers Act, 1941
C. 593, 55 STAT. 839

(Portion remaining from previous amendment (54 Stat. 179) shown in regular type; deleted matter shown in bracketed black face type, and new matter shown in italics.)

5(b) *(1)* During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, *and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise*——

(A) investigate, regulate, or prohibit **[under such rules and regulations as he may prescribe, by means of licenses or otherwise]** any transactions in foreign exchange, transfers of credit **[between or payments by or to banking institutions as defined by the President,]** *or payments between, by, through, or to any banking institution,* and *the importing,* exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, **[or]** currency *or securities,* and **[any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness, or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof;]**

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, hold-

ing, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President **[may]** *shall, in the manner hereinabove provided,* require any person to *keep a full record of, and to* furnish under oath, *in the form of reports or otherwise,* complete information relative to any *act or* transaction referred to in this subdivision *either before, during, or after the completion thereof, or relative to any interest in foreign property,* or *relative* to any property in which any **[such]** *foreign* **[state]** *country* or *any* national **[or political subdivision]** *thereof* has *or has had* any interest, *or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require* **[including]** the production, *or if necessary to the national security or defense, the seizure,* of any books of account, *records,* contracts, letters, *memoranda,* or other papers, **[in connection therewith]** in the custody or control of such person, **[either before or after such transaction is completed.]** *; and the President may, in the manner hereinabove provided, take other and further meas-*

ures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder, shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: PROVIDED, HOWEVER, *That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision.* Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or if a natural person, may be imprisoned for not more than ten years or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

Section 7(c) as amended November 4, 1918 (40 Stat. 1020):

7(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

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Section 7(e):

7(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. * * *

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Section 8(a):

8(a) Any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with

law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: PROVIDED, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: PROVIDED FURTHER, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

Section 9(a):

9(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian

shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

EXECUTIVE ORDERS

Definition of the word "national" as contained in Executive Order 8389 of April 10, 1940 (Tit. 3, C. F. R. Cum. Sup. p. 646) as amended by Executive Order 8785 of June 14, 1941 (id., p. 950):

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5E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this

Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing, control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts or other securities or obligations of a partnership, association, corporation or other organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national. Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.

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Definition of the word "national" as contained in Executive Order 9193 of July 6, 1942 amending Executive Order 9095 (Tit. 3, C. F. R. Cum. Sup., p. 1177):

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10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as

amended, *provided, however,* that persons not within designated enemy countries (even though they may be within enemy occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading With the Enemy Act, as amended.

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